[PRIVY COUNCIL]

1954 *Present :* **Lord Morton of Henryton, Lord Cohen, Lord Keith of Avonholm, Mr. T. Rinfret and Mr. L. M. D. de Silva**

P. MURUGIAH, Appellant, *and* C. L. JAINUDEEN, Respondent

PRIVY COUNCIL APPEAL No. 37 OF 1953

S. C. 140—D. C. Matale, 203

Privy Council—Collation—Matrimonial Rights and Inheritance Ordinance (Cap. 47)—Section 35—Donee's right to keep his gift and renounce share in donor's estate—Registration of Documents Ordinance (Cap. 101)—Section 8—" Instrument affecting land ".

If a father gives property to his son on the occasion of the son's marriage, and dies intestate, the son is not deprived by section 35 of the Matrimonial Rights and Inheritance Ordinance of the option of renouncing all claim to share in his father's estate or of bringing the property into collation. If he chooses the latter alternative, he has a further option of bringing in either the property itself or the value thereof.

Pending administration of the estate of a person who had died intestate it was decided by Court on the 3rd February, 1941, that certain immovable property which had been gifted by the deceased to his son on the occasion of the son's marriage should be brought into collation. No formal order was drawn up to give effect to this decision and no transfer by the donee was executed in favour of the administrator. Subsequently the property was mortgaged by the donee and sold to A by the Fiscal in pursuance of a hypothecary decree entered in favour of the mortgagee. The present action was instituted by A against the administrator for declaration of title to the property and for ejectment of the administrator therefrom.

Held, that the order made by Court on the 3rd January, 1941, could not deprive the donee of his right to sell or mortgage the property. As the property had been mortgaged, and sold to A, the donee could only claim to participate in the estate of the deceased person if he brought in the value of the property gifted, since he was no longer in a position to bring in the property itself, but this fact in no way affected A's title to the property.

Held further, that the order of the 3rd February, 1941, could not be regarded as an instrument affecting land within the meaning of section 8 of the Registration of Documents Ordinance.

APPEAL from a judgment of the Supreme Court reported in *54 N. L. R. 446*.

R. O. Wilberforce, Q.C., with *Gilbert Dold*, for the defendant appellant.

Dingle Foot, Q.C., with *Sirimevan Amerasinghe*, for the plaintiff respondent.

Cur. adv. vult.

November 3, 1954. [*Delivered by* LORD MORTON OF HENRYTON]—

This is an appeal from a judgment of the Supreme Court of Ceylon which reversed a decision of the District Court of Matale given on the 25th January, 1951, and declared that the respondent was entitled to ten acres of land part of a parcel of 27 acres one rood and twenty-two perches of land known as Kirigalpottewatta situate at Udugama in the Central Province of Ceylon.

In the year 1927 one Ponniah was the owner of the whole parcel but on the 1st November, 1927, he executed a deed of gift by which he conveyed the ten acres now in question to his son Sellasamy, reserving a life interest to himself. In the deed of gift the ten acres were expressed to be of the value of Rupees six thousand. This deed was never registered under the Registration of Documents Ordinance.

Ponniah died on the 26th May, 1936, and in September, 1936, his widow commenced proceedings (Case No. 5437) in the District Court of Kandy, asking for letters of administration to be granted to her of the deceased Ponniah's estate and asking also that certain lands donated by Ponniah in his lifetime (including the land now in question) should be brought into hotchpot and treated as part of his estate. Sellasamy was the first respondent to that suit and five other persons were made respondents thereto. On the 7th December, 1936, Sellasamy swore an affidavit opposing grant of letters of administration to the widow in the course of which he (*a*) denied that the second, third and fourth respondents to the suit were the legitimate issue of Ponniah, and (*b*) alleged that he was not bound to bring into hotchpot the said ten acres of land since they were not given to him on the occasion of his marriage or for his advancement or establishment in life.

The relevance of this allegation is that by s. 39 of Ordinance No. 15 of 1876, reproduced by section 35 of the Matrimonial Rights and Inheritance Ordinance (Cap. 47 of the 1938 Edition of the Laws of Ceylon) it is enacted that

> "Children or grandchildren by representation becoming with their brothers and sisters heirs to the deceased parents are bound to bring into hotchpot or collation all that they have received from their deceased parents above the others either on the occasion of their marriage or to advance or establish them in life, unless it can be proved that the deceased parent, either expressly or impliedly, released any property so given from collation."

On the 28th June, 1937, the District Judge granted letters of administration to the widow, and by consent the donated properties were left, for the time being, in the possession of the donees.

The questions raised by Sellasamy's affidavit of the 7th December, 1936, were dealt with by the District Judge on the 3rd February, 1941. He found that the second, third and fourth respondents were legitimate and then proceeded:—

> "The only other question to be decided is whether the 1st respondent who was given a Deed of Gift No. 7881 of 1927 (1 R 3) by his

father Ponniah should bring the property gifted into collation if he wishes to inherit as an heir.

The point to determine is whether, as is stated by respondents 2 to 6 such gift was made on the occasion of his marriage. "

After referring to section 39 of Ordinance No. 15 of 1876 and considering the evidence, which was directed to the point that the only marriage contemplated by Sellasamy at the date of the deed of gift had never taken place, he expressed the opinion that the fact that the marriage did not take place made no difference, as the section applied to a gift made on the occasion of a marriage performed or contemplated. He concluded as follows:—

" I therefore hold that:—

1. All the respondents are lawful heirs.

2. The property gifted to the 1st respondent was on the occasion of his marriage and that its value was 6,000 and that it must be brought into collation. I would also order that the 1st respondent do pay to the other respondents the costs of this inquiry. "

No formal order appears to have been drawn up to give effect to this decision and no transfer by Sellasamy to the administrator was ever executed. Sellasamy appealed first to the Supreme Court and then to this Board on the question whether the property was liable to collation and in both Courts the decision of the District Judge was affirmed.

On the 26th February, 1942, Sellasamy mortgaged the property for Rupees 1,500 but this mortgage was paid off. It was entered on the register of incumbrances pursuant to the Registration of Documents Ordinance (Cap. 101) but the appellant alleges that this registration had no effect as section 15 (1) of the Ordinance had not been complied with.

On the 24th February, 1944, Sellasamy mortgaged the property for Rupees 4,000 advanced by one Appuhamy. This mortgage was also registered but the appellant alleges that this registration also had no effect.

On the 26th August, 1948, Appuhamy commenced proceedings to enforce his mortgage and recovered judgment on the 25th February, 1949. The property was in due course sold by the Deputy Fiscal pursuant to an order made on the 9th August, 1949. It was bought by the respondent for Rupees 400 and was conveyed to him by the Deputy Fiscal on the 21st February, 1950.

In passing their Lordships would observe that in his answer to Appuhamy's claim Sellasamy alleged that the property now in dispute was then included in the estate of Ponniah in Case No. 5437. It was at one time suggested that this was an admission on which the appellant could rely as against the respondent. Having regard to the fact that it was merely a statement made by Sellasamy in proceedings against him by his mortgagee, their Lordships are unable to regard it as in any way binding on the respondent, who derives his title from a sale by the Court at the instance of that mortgage.

On the 19th May, 1950, the appellant procured the registration of the decree of the 3rd February, 1941, on the footing, presumably, that the judgment was an instrument affecting land within the meaning of section 8 of the Registration of Documents Ordinance (Cap. 101).

On the 9th August, 1950, the respondent commenced the present proceedings against the appellant, who had become the administrator of Ponniah's estate, in succession to the widow. The respondent alleged that the appellant had wrongfully and forcibly entered into possession of the land in dispute some three months previously, and claimed a declaration that he (the respondent) was entitled to the land and to consequential relief. The appellant relied on the said order made in Case No. 5437 on the 3rd February, 1941, and contended that by virtue thereof Sellasamy lost all rights to the land in dispute. The appellant also relied on the registration of that order as giving him priority over the respondents under section 7 of the Registration of Documents Ordinance. On the 21st December, 1950, the respondent moved to amend his plaint so as to enable him to rely on section 3 of the Prescription Ordinance No. 22 of 1871. It is not clear whether this application was granted but for reasons which will appear hereafter this point is of no importance.

The pleadings being closed, issues were framed as follows :—

(1) Has the title of Sellasamy derived on P2 (the mortgage of 24th February, 1944) passed to the plaintiff on P3 (the conveyance by the Deputy Fiscal on the 21st February, 1950) ?

(2) Is the order made on 3rd February, 1941—D2 in Testamentary proceedings 5437 of D. C. Kandy, *res judicata* between the parties ?

(3) If so, is defendant as administrator of the said estate in lawful possession of the said premises ?

On the 25th January, 1951, the District Judge gave judgment dismissing the action. He held that the effect of the order of the 3rd February, 1941, was that the subject matter in dispute lost its identity and got submerged in the estate, Sellasamy and the other heirs becoming entitled to an undivided share of the whole estate. Accordingly he answered the issues as follows:— "1. No. 2. Yes. 3. Yes."

From this order the present respondent appealed, and on the 18th September, 1952, the Supreme Court allowed the appeal, declared the present respondent entitled to the property in dispute, and made an order for the ejection of the appellant therefrom.

As the appellant's claim to the property rests entirely upon the order of 3rd February, 1941, it is convenient first to consider what was the law applicable at the date when that order was made. It was agreed before their Lordships that the following passage from Steyn's " Law of Wills in South Africa " (1935 Edition, p. 103) was a correct statement of the law applicable in Ceylon before the passing of Ordinance No. 15 of 1876 :—

" Collation is the duty incumbent on all descendants who as heirs wish to share in the succession to an ancestor, either by will

or *ab intestate*, of accounting to the estate of the ancestor for certain kinds of gifts and debts received from or owing to him by them during his lifetime.

Thus, if a child, grandchild or more remote descendant wishes in inherit from a parent, grandparent or remote ascendant from whom he has during his lifetime received any property or money as his portion of his inheritance, or as a marriage gift or otherwise for his advancement in trade or business or such like, he will, before the division of the estate, have to bring into or collate with the estate of such parent, &c., either what he may have so received or enjoyed or the true value of the same at his option, so that the whole estate, thus augmented, may be divided in terms of the will of the testator or according to the law of succession *ab intestate*. "

Thus, if a father gave property to his son on the occasion of the son's marriage, and died intestate, the son had the option of renouncing all claim to share in his father's estate or of bringing the property into collation. If he chose the latter alternative, he had a further option of bringing in either the property itself or the value thereof.

Mr. Wilberforce for the appellant submitted that the effect of section 39 of Ordinance No. 15 of 1876 (which has already been quoted in full) was to take away both of these options and to impose on the donee a positive obligation to bring into the estate, so as to form part thereof, the property the subject of the gift; that there was no option to surrender the value of the property instead of the property itself; and that the order of the 3rd February, 1941, was in effect a declaration of title in favour of the administrator of Ponniah's estate. He relied in particular (*a*) upon the fact that the section does not contain any qualifying words such as " if they wish to share in the estate " and (*b*) upon the absence of any reference in the section to the alternative of bringing into hotchpot the value of the property instead of the property itself.

If Mr. Wilberforce's argument is correct, the section made a very striking change in the law, for which he could suggest no reason. Their Lordships do not doubt that if and so far as any provision of the section is inconsistent with the provisions of the Common Law, the section must prevail. It was for this reason that the Supreme Court in *Vaitianathen v. Meenatchi* [1] held that after the passing of the section collation took place only when a parent gives property to his children either on the occasion of their marriage or to advance or establish them in life. In their Lordships' view, however, there is nothing in the section inconsistent with the preservation of the two options already mentioned. The first option is preserved by the words " becoming . . . heirs to the deceased parents ", which do not rule out the alternative that the donee may elect not to claim his share as an heir. The second option is preserved by the use of the words " bring into hotchpot or collation ". The Ordinance under consideration contains no definition of " hotchpot

[1] *(1913) 17 N. L. R 26.*

or collation " nor does it contain any provision from which their Lordships can attribute any particular meaning thereto. The proper course in these circumstances is to attribute to the words the meaning which they bore under the law applicable immediately before the section was enacted. That meaning undoubtedly conferred upon the donee the second of the two options already mentioned.

Mr. Dingle Foot for the respondent referred their Lordships to the following passage in Maxwell's "Interpretation of Statutes" 10th Edition, page 81 :

> " *Presumption against Implicit Alteration of Law*
>
> One of these presumptions is that the legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares either in express terms or by clear implication, or, in other words, beyond the immediate scope and object of the statute. In all general matters outside those limits the law remains undisturbed. It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness."

Their Lordships agree that the law is correctly stated in the passage cited. They would only add that they agree with the opinion expressed by Gunasekara J. in the Supreme Court that the language of the section, " confirms rather than negatives the view that the legislature did not intend to take away the heir's option to discharge a liability to collation by bringing the value of the property into account. "

Turning to the question of the effect of the order of the 3rd February, 1941, it is important to observe the learned District Judge's statement of the question he was deciding. Their Lordships will therefore repeat the citation they have already made :

> " The only other question to be decided is whether the 1st respondent who was given a Deed of Gift No. 7881 of 1927 (1 R 3) by his father Ponniah should bring the property gifted into collation if he wishes to inherit as an heir.
>
> The point to determine is whether, as is stated by respondents 2 to 6, such gift was made on the occasion of his marriage. "

It is no doubt true that the form of his final conclusion indicates that the learned judge was assuming that Sellasamy would claim his share in the inheritance, but having regard to the way in which the learned judge had stated the question he had to determine their Lordships are unable to construe his order as depriving Sellasamy either of his right to retain his gift and renounce his share in the inheritance or, if he desired to participate, of his option to bring in the value of the gift instead of the property given. Sellasamy thus retained the legal estate in the property, and there was no fetter upon his power to sell or mortgage it. As their Lordships have already stated, he proceeded to mortgage the property and it was sold to the respondent by the Deputy Fiscal in proceedings

commenced by the mortgagee. Thereafter Sellasamy could only claim to participate in the inheritance if he brought in the value of the property given, since he was no longer in a position to bring in the property itself, but this fact in no way affects the respondent's title to the property.

Having regard to the view of the order which their Lordships have just expressed, they cannot regard it as being an instrument affecting land, within s. 8 of the Registration of Documents Ordinance. Thus the registration of the order in 1950 was ineffective to defeat the title of the respondent, even if it be assumed that the registration of the two mortgages was also of no effect.

It was suggested in argument that the registration of the order was ineffective to defeat the title of the respondent for other reasons also but it is unnecessary to state these reasons or to arrive at a conclusion upon them.

As the respondent succeeds on the strength of the conveyance to him by the Deputy Fiscal, their Lordships need not consider whether he ought to be allowed to rely on the Prescription Ordinance, No. 22 of 1871.

Their Lordships will humbly advise Her Majesty to dismiss the appeal. The appellant must pay the respondent's costs.

Appeal dismissed.